



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NO. 397 OF 2018

DR. ADIL HUSSAIN GULAM.....CLAIMANT

VERSUS

MOMBASA COUNTY CHIEF OFFICER, MEDICAL SERVICES.....1ST RESPONDENT

MEDICAL SUPERINTENDENT, LIKONI SUBCOUNTY HOSPITAL.....2ND RESPONDENT

COUNTY GOVERNMENT OF MOMBASA.....3RD RESPONDENT

J U D G M E N T

1. The Claimant sued the Respondent vide a Memorandum of Claim dated 12th June 2018 and filed in Court on 13th June 2018 and pleaded, *inter alia*:-

a) that the 3rd Respondent, the County Government of Mombasa, is the Claimant's employer, having absorbed him into service upon appointment by the National Government pursuant to the provisions of Part 2(2), Schedule 2 of the Constitution of Kenya.

b) that the Claimant was employed as a Dental Officer (intern) at Job group "L" with a gross monthly salary of kshs.30,472, and was posted to Coast Provincial General Hospital vide a letter of appointment dated 27th March 2012.

c) that after internship, the Claimant was posted to Likoni District Hospital as a Dental Officer vide a letter dated 29th May 2013 under Ref No. 201206554/7.

d) that at all material time during the course of his employment, the Claimant dutifully, diligently and faithfully performed his part of the employment contract with the Respondent.

e) that from the month of February 2018, however, the Respondents unlawfully withheld the Claimant's salary without according the Claimant any reason whatsoever; as a result of which the Claimant became unable to continue rendering services at the Respondent's facility.

f) that on 17th November 2017, the Claimant received a letter from the Respondents accusing him of leaving station before time and absenting himself from work without permission, and inviting him to appear before a disciplinary committee on 23rd November 2017 at 10.30 a.m.

g) that the disciplinary hearing never took place as it was postponed by the Medical Superintendent via a whatsapp message to the Claimant in the morning of 23rd November 2017, and again on 7th December 2017.

h) that the Respondent wrote a letter to the Claimant on 23rd January 2018, charging him with failure, ignoring or refusing to appear before the Hospital Disciplinary Committee on 17th November 2017 and instructing the (Respondents') Chief Officer of Health to stop the Claimant's salary and to take necessary action.

i) that subsequently, the Claimant sought legal counsel and intervention and demanded four (4) months salary.

j) that the Respondents constructively dismissed the Claimant without affording him any hearing, which dismissal was

unfair and contrary to the dictates of the Rules of Natural Justice and provisions of the Employment Act.

k) that the purported disciplinary process was manifestly tainted by the fact that the Respondents unilaterally altered the date for hearing, with a pre-conceived goal of ensuring that the Claimant was absent at the hearing.

2. The Claimant prayed for:

a) a declaration that wilful withholding of the Claimant's salaries for the months of February to May 2018 by the Respondents without lawful justification was an infringement to the Claimant's right to fair remuneration as enshrined in Article 41(1) and 2(a) of the Constitution of Kenya 2010 which entitles the Claimant to fair remuneration.

b) exemplary damages for breach of the Claimant's right to fair remuneration.

c) a declaration that withholding of the Claimant's salaries for the months of January to May 2018 by the Respondents without lawful justification amounted to an offence by virtue of Section 17(10) (a) & (b) of the Employment Act 2007.

d) punitive damages for withholding the Claimant's salary for four (4) months).

e) a declaration that the Claimant was unlawfully terminated by the Respondents.

f) salary for January to May 2018 computed at (ksh.159,472.50x5) =637,890.00

g) twelve months' salary for unfair termination computed at (kshs.159,472.50X12) =.....ksh.1,913,670.00

h) leave days accrued (45) days =kshs.318,945.00

Kshs.2,870,505.00

i) Certificate of service.

j) Costs of the suit and interest.

3. Together with the Memorandum of Claim, the Claimant filed the documents referred to in his pleadings, save for the letter referred to at paragraph 5 of the Memorandum of Claim, which the Court could not trace among the documents filed by the Claimant. Documents filed included the Claimant's payslip for January 2018, in which the Claimant's gross salary was shown to have been ksh.222,660 while the net salary was 159,472.50 as at the said date. The said copy of payslip was not referred to in the Claimant's Memorandum of Claim, but was filed together with the Claimant's documents.

4. The Claimant also filed his witness statement dated 3rd February 2020 and filed in Court on 5th February 2020.

5. On their part, the Respondents filed a joint Response to Claim on 15th October 2018 and pleaded, *inter-alia*:-

a) that the Claimant was a frequent absentee from his place of work without seeking authorization; and had neglected his responsibilities without sufficient reason.

b) that withholding of the Claimant's salary was lawful and in line with Section 65(2) (a) of the Public Service Commission Act 2017.

c) that the disciplinary meeting scheduled for 23rd November 2017 was not postponed as pleaded by the Claimant.

d) that termination of the Claimant's employment was fair, just and lawful.

e) that the Respondent did not constructively dismiss the Claimant without affording him a fair hearing, but was summarily dismissed under Section 44(3) of the Employment Act.

f) that due process was followed in terminating the Claimant's employment.

g) that the Claimant is not entitled to salary for the months of February to May 2018, damages and leave pay.

h) the Respondents invited the Court to find that the Claimant had breached his contract of service and that his dismissal by the Respondents was within the law, and to dismiss the claim with costs.

6. The Respondents also filed a witness statement of one William Ngala dated 23^d September 2021 and a (further) list of documents dated the same date (23rd September 2021), listing eight documents. The listed documents included a letter (notice to show cause) dated 18th May 2017, the Claimant's response thereto dated 12th June 2017, minutes of a meeting held on 12th June 2017, a letter dated 17th November 2017,

the Medical Superintendent's letter dated 23rd January 2018, a letter dated 2nd February 2018, a letter dated 17th May 2018 and minutes of a meeting dated 28th May 2018.

7. When the trial opened on 25th October 2021, the Claimant adopted his recorded and filed witness statement, which basically replicates the averments contained in the Memorandum of Claim, as his evidence in chief. He produced the documents filed with his statement of claim as exhibits.

8. The Claimant further testified, both in chief and under cross examination:-

a) that his salary was stopped from February to June 2018, and for reasons unknown to him.

b) that he was not subjected to any disciplinary hearing. That no disciplinary meeting was held pursuant to the Medical Superintendent's letter dated 17th November 2017, as the meeting scheduled for 23rd November 2017 was postponed by the Respondents via WhatsApp, and rescheduled by WhatsApp to 7th December 2017 and again postponed via WhatsApp. That the meeting never took place.

c) that on 25th January 2018, the Claimant received the Respondents' letter dated 23rd January 2018 accusing him of refusing or failing to appear before a disciplinary committee (on 23rd November 2017). That the same letter also advised the (Respondents') Chief Officer of Health to stop the Claimant's salary and to take necessary action.

d) that the Claimant found this to be ridiculous as the same people who postponed the disciplinary meeting were now accusing him (the Claimant) of failing to attend the same.

e) that the Claimant was never suspended from duty, and no disciplinary hearing took place (on the basis of the letter dated 17th November 2017).

f) that vide a letter dated 17th May 2018, the Claimant was invited for a meeting to be held on 28th May 2018 which was postponed by the Respondents via WhatsApp to 30th May 2018. That when the Claimant went to the venue of the meeting on 30th May 2018, he was informed that the meeting had taken place on 29th May 2018 and that his presence at the meeting was not considered necessary.

g) that his gross monthly salary was ksh.222,000. That his salary was a crucial part of his contract and its stoppage meant that the Respondents did not want him to continue working.

9. On his part, the Respondents' witness, William Ngala, told the Court that he is the Respondent's Human Resource Officer in the Department of Labour. He adopted his recorded and filed statement as his evidence in chief and produced as exhibits the documents listed on the Respondents' further list of documents as exhibits. The witness further told the Court, both in chief and under cross examination:-

a) that from 1st May 2017, the Claimant started absencing himself from work and was, after verbal warnings, issued with a letter dated 18th May 2017, to which he responded on 12th June 2017.

b) that a disciplinary meeting was held on 12th June 2017, and it was decided that the matter be taken up with the Chief Officer.

c) that the Chief Officer issued the Claimant with a letter to attend a disciplinary hearing on 28th May 2018, when it was decided that the Claimant's salary be stopped.

d) that there were no minutes to show that the meeting scheduled for 23rd November 2017 took place; or that the one slated for 7th December 2017 was postponed.

e) that the letter dated 2nd February 2018 was on stopping the Claimant's salary; yet the Claimant had not been suspended.

f) that the Respondents have an attendance register which employees sign as they report to work and as they leave.

10. In view of the pleadings filed and evidence tendered by the parties, issues for determination appear to me to be as follows:-

a) whether the Respondents' letter to the Claimant dated 17th November 2017 amounted to a notice to show cause, and whether it complied with the provisions of Section 41 of the Employment Act 2007.

b) whether any disciplinary proceedings were held on 23rd November 2017.

c) whether withholding or stopping of the Claimant's salary as from February 2018 without according the Claimant a hearing was just, and whether it amounted to constructive and unfair termination of the Claimant's employment.

d) whether the Claimant is entitled to the reliefs sought.

11. Before addressing the first issue, I have to bring out the fact that the disciplinary process shown to have been commenced by the Respondents against the Claimant vide a letter/a show cause letter dated 18th May 2017, and to which the Claimant responded vide his letter dated 12th June 2017, concluded and terminated upon the disciplinary hearing shown by the Respondents to have been held on 12th June 2017. The Claimant was “**pardoned**” by the Respondents pursuant to this hearing. This position is clear from the Respondents’ letter to the Claimant dated 23rd January 2018 (the Respondents’ exhibit no. 5).

12. It was held in the case of Dr. Joseph Maingi Maitha-vs- Permanent Secretary Ministry of Medical Services and Another [2015] eKLR that once some form of disciplinary action is shown to have been taken against an employee, offences forming the subject matter of the concluded disciplinary process cannot be used against the employee at a future date.

13. On the first and second issues, the Claimant testified that on 17th November 2017, he received a letter from the Respondents (dated 17th November 2017.) alleging that the Claimant had been absenting himself from work, and asking him to attend a disciplinary hearing on 23rd November 2017; but that the meeting was rescheduled/postponed by the Respondents’ Likoni Hospital Administrator via WhatsApp. The Claimant testified further that the disciplinary meeting did not take place on 7th December 2017, the date to which it had been postponed by the Respondents.

14. The said letter, dated 17th November 2017, did not fully comply with the mandatory requirements of Section 41(1) of the Employment Act as it did not inform the Claimant of his right to be accompanied to the planned disciplinary meeting by a person/witness of his choice.

15. The said letter (dated 17th November 2017), repeated the allegations contained in the Respondents’ letter/notice to show cause dated 18th May 2017, whereon disciplinary proceedings had been concluded on 12th June 2017. The letter dated 17th November 2017 did not specify the dates on which the Claimant absented himself from work or left the office early, to show that those dates fell after the concluded disciplinary proceedings. The said letter (dated 17th November 2017) was, therefore, not a valid show cause letter.

16. Although the Respondent’s witness maintained that the meeting scheduled for 23rd November 2017 was not postponed by WhatsApp as stated by the Claimant, he did not produce any minutes to show that the meeting took place, and did not tell the Court what was resolved at the alleged disciplinary meeting. It is my finding that the meeting scheduled for 23rd November 2017 never took place, and no disciplinary proceedings were taken on that date.

17. The Respondents’ allegations that the Claimant absented himself from work and left office early were never proved, despite testimony in Court by the Respondents’ witness **that the Respondents have an attendance register which employees sign when they report to work and when they leave. This register was not exhibited in Court to prove the Respondents’ allegations against the Claimant.**

18. The Respondents stopped the Claimant’s salary in February 2018, despite the fact that the Claimant had neither been suspended from duty nor dismissed from employment. This position is confirmed by the Respondents’ exhibit nos. 5 and 6 (letters dated 23rd January 2018 and 2nd February 2018). The Claimant testified that his salary was withheld during the months of February, March, April and May 2018. The Claimant pleaded in the Claim herein filed on 13th June 2018, and testified that withholding of his salary for six months amounted to constructive termination of his employment/dismissal by the Respondents.

19. On the third issue, withholding of the Claimant’s salary for four months was a serious breach which can be viewed as a repudiation, by the employer, of the Claimant’s contract of employment.

20. An employee’s salary or wages is a crucial component of an employment contract. Indeed, willful non-payment of an employee’s salary by an employer is not only repudiatory of the contract of employment, but also amounts to a wage offence under Section 17 of the Employment Act, for which an employer may be criminally prosecuted. In the case of Kenneth Kimani Mburu & Another –vs- Kibe Mungai Holdings Ltd [2014] eKLR, the Court held that the Claimants, whose salaries had been withheld by the employer for four months, were entitled to consider themselves as having been constructively dismissed from employment.

21. In determining what amounts to constructive dismissal in the case of EDWIN BETI KIPCHUMBA –VS- NATIONAL BANK OF KENYA LIMITED [2018] eKLR, the Court of Appeal cited with approval the Industrial Court’s decision in Cause No. 611(N) of 2009 between Maria Kagai Ligaga –vs- Coca Cola East and Central Africa Limited where it was held:-

“Constructive dismissal occurs where the employer’s behavior is so intolerable that it makes it considerably difficult for the employee to continue working. The employee initiates termination believing himself to have been fired. The employer is deemed to no longer be interested in honouring the terms of the contract of employment. The employee must demonstrate that the employer has engaged in repudiatory breach. The Court must be persuaded that the employee has reason to resign. Employer’s actions need not be coercive, threatening or in the nature of duress.”

22. The employee in the Maria Ligaga case (supra), who had been serially transferred, was found to have been constructively dismissed, and was awarded damages for unlawful dismissal. The decision was upheld by the COURT OF APPEAL IN CIVIL APPEAL NO. 20 OF 2010, COCA COLA EAST & CENTRAL AFRICA LIMITED –VS- MARIA KAGAI LIGAGA [2015] eKLR. The Court of Appeal referred to the authoritative meaning of constructive dismissal as articulated by Lord Denning MR in WESTERN EXCAVATING (ECC) LTD –VS- SHARP [1978] ICR 222 or [1978] QB761, as follows:-

“If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows

that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct.

He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or alternatively, he may give notice and say that he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once."

23. In the present case, the Respondents' act of stopping the Claimant's salary for four months on allegations of failing to attend an alleged disciplinary meeting on 23rd November 2017, which meeting never was, or for whatever reason, amounted to a breach going to the root of the Claimant's employment contract. It showed that the Respondents no longer intended to be bound by the terms of the employment contract. This repudiatory breach entitled the Claimant to treat himself as discharged from further performance of his contractual duties. The Claimant treated himself as discharged from further performance, and filed the suit herein on 13th June 2018. For record purposes, I must point out that the letter written to the Claimant by the Respondents on 17th May 2018, and any purported proceedings thereon, did not, and could not, change the situation.

24. The Claimant was constructively dismissed by the Respondents and the dismissal and/or termination was unfair. I so declare.

25. On the 4th issue, the Claimant is entitled to payment of his salary for the months of February, March, April and May 2018. The Claimant is also entitled to compensation for unfair termination of employment, and I award him ten (10) months' salary as compensation for unfair termination of employment, at the rate of Ksh.159,472.50 per month as pleaded.

26. The claim for forty five (45) unpaid leave days was not proved. No evidence was adduced by the Claimant in proof of the same. A claim based on accrued leave days is in the nature of a claim for special damages, and must be strictly proved. This was not done, and the claim is declined.

27. On the Claimant's claim based on Article 41(1) and (2)(a) of the Constitution of Kenya, it is my finding that the Claimant's claim, which arises from an employer-employee relationship, falls within the purview of the Employment Act, and that the available reliefs fall under Section 49 of the Employment Act. The Employment Act is enacted pursuant to the Constitution of Kenya 2010. The Claimant has not demonstrated that his fundamental rights, or any of them, has been infringed. The claims based on Article 41(1) and 2(2) of the Constitution of Kenya are therefore declined.

28. The prayers for a declaratory order and for damages based on Section 17(10) (a) & (b) of the Employment Act 2007 is declined. Section 17(10) (a) & (b) creates an offence which, on conviction, attracts a hefty fine or jail term or both. The Claimant had the option of pressing for charges against the Respondents under the said law; but he did not. He elected to institute the claim herein, which is of a civil nature. He cannot be allowed to convolute the proceedings herein with matters laden with undertones of a criminal nature.

29. In sum, judgment is hereby entered in favour of the Claimant against the Respondents jointly and severally as follows:-

a) Unpaid salary for the months of February, March, April and May 2018 (computed at ksh.159,472.50 per month)
.....ksh.637,890.00

b) Ten months salary being compensation for unfair termination of employment (at the rate of Ksh.159,472.50 per month) .
.....ksh.1,594,752.50

Total Ksh. 2,232,615.50

30. The Respondents shall issue the Claimant with a Certificate of Service pursuant to Section 51(1) of the Employment Act 2007 within thirty days of this judgment.

31. The Claimant is also awarded costs of the suit and interest at Court rates from the date of this judgment until payment in full.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 27TH DAY OF JANUARY 2022

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

Njau for Wachenje for Claimant

Miss Kuria for Respondent